Agenda Date: 11/16/15
Agenda Item: 8G

STATE OF NEW JERSEY

Board of Public Utilities
44 South Clinton Avenue, 9th Floor
Post Office Box 350
Trenton, New Jersey 08625-0350
www.nj.gov/bpu/

CLEAN ENERGY

ORDER

IN THE MATTER OF THE IMPLEMENTATION OF L. 2012, C. 24, THE SOLAR ACT OF 2012	)	DOCKET NO. EO12090832V
IN THE MATTER OF THE IMPLEMENTATION OF L. 2012, C. 24, N.J.S.A. 48:3-87(T) – A PROCEEDING TO ESTABLISH A PROGRAM TO PROVIDE SRECS TO CERTIFIED BROWNFIELD, HISTORIC FILL AND LANDFILL FACILITIES	)	DOCKET NO. EO12090862V
PRO-TECH ENERGY SOLUTIONS, LLC FLORENCE LAND RECONTOURING LANDFILL: MOTION FOR RECONSIDERATION	)	DOCKET NO. QO14070714

Party of Record:

Dennis M. Toft, Esq., of Chiesa, Shahinian & Giantomasi, PC, on behalf of Pro-Tech Energy Solutions, LLC[1]

BY THE BOARD:[2]

This Order concerns a letter filed as a request for reconsideration ("Motion") by Pro-Tech Energy Solutions, LLC ("Pro-Tech"), requesting that the Board of Public Utilities ("Board") reconsider its January 21, 2015 Order which limited conditional approval under N.J.S.A. 48:3-87(t) for the proposed solar facility to be eligible to generate solar renewable energy certificates ("SRECs") to that portion of the facility to be located on the capped portion of the site.[3]

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[1] Subsequent to the issuance of the Board Order which is now under reconsideration, Pro-Tech retained legal counsel.

[2] Commissioner Upendra J. Chivukula did not participate in discussion, deliberation, or vote on this matter.

[3] I/M/O the Implementation of L. 2012, c. 24, the Solar Act of 2012; I/M/O the Implementation of L. 2012, c. 24, N.J.S.A. 48:3-87(t) – a Proceeding to Establish a Program to Provide SRECs to Certified Brownfield, Historic Fill and Landfill Facilities; and I/M/O Pro-Tech Energy Solutions, LLC Florence Land Recontouring Landfill, Dkt. Nos. EO12090832V, EO12090862V and QO14070714 (January 21, 2015) ("January 21 Order").

BACKGROUND

On July 23, 2012, L. 2012, c. 24 ("Solar Act") was signed into law by Governor Chris Christie. The Solar Act amends certain aspects of the statute governing generation, interconnection, and financing of renewable energy. The Solar Act, specifically, N.J.S.A. 48:3-87(t) ("Subsection t"), provides that:

> [n]o more than 180 days after [July 23, 2012], the board shall, in consultation with the Department of Environmental Protection and the New Jersey Economic Development Authority, and, after notice and opportunity for public comment and public hearing, complete a proceeding to establish a program to provide SRECs to owners of solar electric power generation facility projects certified by the board, in consultation with the Department of Environmental Protection, as being located on a brownfield, on an area of historic fill or on a properly closed sanitary landfill facility. . . . Projects certified under this subsection shall be considered "connected to the distribution system" [and] shall not require such designation by the board[.]
>
> [N.J.S.A. 48:3-87(t).]

The Solar Act defines a "properly closed sanitary landfill facility" as

> [a] sanitary landfill facility, or a portion of a sanitary landfill facility, for which performance is complete with respect to all activities associated with the design, installation, purchase, or construction of all measure, structures, or equipment required by the Department of Environmental Protection, pursuant to law, in order to prevent, minimize, or monitor pollution or health hazards resulting from a sanitary landfill facility subsequent to the termination of operations at any portion thereof, including, but not necessarily limited to, the placement of earthen or vegetative cover, and the installation of methane gas vents or monitors and leachate monitoring wells or collection systems at the site of any sanitary landfill facility.
>
> [N.J.S.A. 48:3-51.]

In an Order dated January 24, 2013, the Board approved a certification process for proposed projects seeking approval pursuant to Subsection t to be eligible to generate SRECs. January 24 Order at 12-13.[4] Consistent with the Solar Act, the process incorporates the expertise of the

[4] I/M/O the Implementation of L. 2012, c. 24, the Solar Act of 2012; I/M/O the Implementation of L. 2012, c. 24, N.J.S.A. 48:3-87(t) – a Proceeding to Establish a Program to Provide SRECs to Certified Brownfield, Historic Fill and Landfill Facilities; and I/M/O the Implementation of L. 2012, c. 24, N.J.S.A. 48:3-87(u) – a Proceeding to Establish a Registration Program for Solar Power Generation Facilities, Dkt. Nos. EO12090832V, EO12090862V and EO13010009V (January 24, 2013) ("January 24 Order")

Department of Environmental Protection ("DEP") to confirm eligibility of a potential project by land use classification, and to account for the state of remediation of the project site. Id. Applicants must provide a map of the portion of the relevant area which has been properly remediated or closed, as well as of the location where the solar facility is proposed to be sited. Id. at 13. DEP reviews this material in making its recommendation to the Board. Id.

On July 14, 2014, Pro-Tech submitted an application to the Board to have its project certified as being located on a properly closed sanitary landfill facility pursuant to Subsection t of the Solar Act ("the Application"). The Application identified the property owner as A&S Transportation Company ("A&S").[5] Applicant's 9.2 MW dc project was proposed to be constructed as five arrays, 'A' through 'E', on the former Florence Land Recontouring ("FLR") Landfill site in Florence Township, Burlington County, New Jersey. To its Application, Pro-Tech attached a record of the United States Environmental Protection Agency ("USEPA") that described the site as 60[6] acres with a 29-acre landfill.

On December 19, 2014, DEP issued an advisory memorandum ("DEP December 2014 Memo") to Board Staff on the land use classification and the closure or remediation status of the proposed project. DEP noted that following investigation by both itself and USEPA and the placement of the FLR Landfill on the National Priorities List, USEPA had selected a remedy, with DEP's consent, that included installation of a new cap over the 29-acres landfill and a new leachate collection system. (DEP December 2014 Memo at 2.) Based on its review of the Application and of the investigations conducted by DEP and USEPA, DEP determined that "only the 29-acre landfill area covered by the cap meets the definition of a "properly closed sanitary landfill facility." Id. DEP further advised that based on the figures included in the Application, which showed the proposed placement of the five separate solar arrays and the depiction of the "landfill area," Arrays B, C, and D are within the "landfill area" boundary that constitutes the properly closed sanitary landfill facility, and Arrays A and E are outside of the boundaries of the properly closed sanitary landfill facility. Id.

Based on the Application and DEP's advisory memorandum, the Board granted conditional certification to the portions of the FLR Landfill project, specifically, Arrays B, C and D, which are located on land that constitutes a properly closed sanitary landfill facility. Accordingly, the Board directed Pro-Tech to revise its application so that all proposed capacity was located upon the 29 acres which constitute a properly closed sanitary landfill facility as defined by the Solar Act.

Pro-Tech did not submit a revised application. Instead, on February 27, 2015, Pro-Tech filed a letter, requesting that the January 21 Order be amended to include the entire site and to certify all five proposed solar arrays.[7] Motion at 1. Pro-Tech submits that its Application showed that

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[5] While the Subsection (t) Landfill Application identifies only Pro-Tech as the applicant, the cover letter filed with it characterizes A&S as the applicant. Notably, a July 27, 2015 letter by Mr. Toft identifies the applicant as Pro-Tech. This Order will rely upon the actual application and refer to Pro-Tech rather than A&S as the applicant. Also, because some documents identify Mr. Toft as representing Pro-Tech and A&S while others, specifically the July 27, 2015 letter, identify Mr. Toft as representing A&S, a clarification was sought from Mr. Toft. On October 22, 2015, Mr. Toft indicated that he represents Pro-Tech and A&S. Again, this Order concerns Pro-Tech's application.

[6] Pro-Tech's application described the site as approximately 68 acres.

[7] The Motion states that it is being filed by Pro-Tech and A&S. Pursuant to the Motion, Mr. Toft represents both Pro-Tech and A&S.

the entire site, approximately 68 acres, "is a closed superfund site" which meets the definition of a closed landfill or a brownfield.[8] (Motion at 1.) Pro-Tech recognizes that "although a majority of the waste material was contained in 29 of the 68 acres, the entire site has potential contamination and is subject to a review every 5 years by the USEPA to insure that the cleanup of the site remains effective." Id. at 2.

Pro-Tech maintains that the Florence site is exactly the type of site that the Legislature envisioned for certification under Subsection t as it is both a landfill and a brownfield. Pro-Tech also avers that to the extent that the Board and the DEP apply "an overly restrictive view of the definition" of a closed landfill, the remainder of the site should be deemed a brownfield.[9] Id. at 2.

Following the transmittal of the Motion to DEP and while DEP was reviewing the Motion, Pro-Tech submitted a letter to DEP, urging, among other things, that DEP recommend that the Board amend its January 21 Order and certify the entire FLR site as a landfill. July 27 Letter at 1.[10] Pro-Tech alleges that the January 21 Order was based on DEP's erroneous determination that "only the portion of the former superfund site that was capped and contained constitutes the 'sanitary landfill facility." Id. at 2. Pro-Tech avers that N.J.S.A. 48:3-51 refers to a "facility", which is not limited to the sanitary landfill. Rather, it includes areas being used to monitor the impacts of the facility. Therefore, the entire 60-acre area meets the definition of a properly closed sanitary landfill facility under the Solar Act. July 27 Letter at 2.

On September 11, 2015, DEP issued an advisory memorandum ("DEP September 2015 Memo") to Board Staff, in which, among other things, it reaffirmed its earlier analysis that only the 29-acre "landfill area covered by the cap and surrounded by the slurry wall" are located on a properly closed sanitary landfill facility. (DEP September 2015 Memo at 2.) Relying on the statutory definition, DEP advises that only Arrays B, C and D are located "on areas at which DEP required measures, structures, or equipment (namely, a cap and slurry wall) in order to prevent, minimize, or monitor pollution or health hazards resulting from a sanitary landfill facility subsequent to the termination of operations." Id. DEP states that although there were other measures implemented pursuant to the USEPA Record of Decision, none of those measures, which include the leachate collection, was implemented at the area where Array E is proposed to be located. Id.

Addressing the statement in Pro-Tech's July 27 Letter that the 39-acre area adjacent to the capped landfill area contains groundwater monitoring wells that are used by USEPA to assess the effectiveness of the closure of the entire superfund site, DEP notes that the presence of groundwater monitoring wells is insufficient to render an area a properly closed sanitary landfill facility. Id. at 2-3. DEP advises that based on its expertise, these types of wells are frequently

[8] "Brownfield" is defined as "any former or current commercial or industrial site that is currently vacant or underutilized and on which there has been, or there is suspected to have been, a discharge of a contaminant." N.J.S.A. 48:3-51.

[9] As of February 27, 2015, the filing date of the Motion, Pro-Tech had only filed an application seeking certification of the property as a properly closed sanitary landfill facility. Pro-Tech did not file an application seeking certification as a brownfield until May 7, 2015. The Board will address the Subsection t brownfield application in a separate order.

[10] The July 27 Letter also discusses the brownfield application. As noted in footnote 9, the brownfield application will be addressed separately.

installed off site – including in adjacent residential areas – following implementation of a remedial action. DEP further advises that because the term "properly closed sanitary landfill facility" may encompass only "a portion of a sanitary landfill facility," "the Solar Act's definition of a 'properly closed sanitary landfill facility' is not intended to capture areas adjacent to the landfill facility where groundwater monitoring wells may be located." Id. at 3. Accordingly, DEP reaffirms that only 29 acres of the proposed solar project constitutes a properly closed sanitary landfill facility under the Solar Act. Id.

Under N.J.A.C. 14:1-8.7, the Board must grant or otherwise expressly act upon a motion for reconsideration or rehearing within 60 days of its filing, or it will be deemed denied. Due to the additional time needed to review and respond to the motion, on May 19, 2015, the Board approved the issuance of a Secretary's letter to Pro-Tech, informing it that the Board was continuing its review, and would act on it beyond the 60-day time limit.

FINDINGS AND CONCLUSIONS

As a threshold matter, the Board notes that the Motion was filed out of time. The Board's rules set a 15-day limit for filing motions of reconsideration, N.J.A.C. 14:1-8-6(a)1, and Pro-Tech's Motion was filed outside of that time frame. The Board's Rules also require that a request for reconsideration be done by a motion that enumerates in separately numbered paragraphs the alleged errors of law or fact that were relied upon by the Board in rendering its decision. N.J.A.C. 14:1-8-6(a)1. Pro-Tech did not file a motion or otherwise conform to the requirements of the regulation. However, the Board has the power to relax its administrative rules if doing so permits the Board to effectively carry out its statutory functions. N.J.A.C. 14:1-1.2.

Absent a legislative restriction, administrative agencies have the inherent power to reopen or to modify and rehear prior decisions, e.g. In re Trantino Parole Application, 89 N.J. 347, 364 (1982). As to the Board, N.J.S.A. 48:2-40 expressly provides that the Board at any time may order a rehearing and/or extend, revoke or modify an order made by it. Twp. of Deptford v. Woodbury Terrace Sewerage Corp., 54 N.J. 418, 425 (1969). See also, N.J.A.C. 14:1-8.6(b). An administrative agency may invoke its inherent power to rehear a matter "to serve the ends of essential justice and the policy of law." Handlon v. Town of Belleville, 4 N.J. 99, 107 (1950). The power to reappraise and modify prior determinations may be invoked by administrative agencies to protect the public interest, and thereby to serve the ends of essential justice. Trap Rock Industries, Inc. v. Sagner, 133 N.J. Super. 99, 109 (App. Div. 1975).

The Board will not modify an order in the absence of a showing that the Board's action constituted an injustice or that the Board misunderstood or failed to take note of a significant element of fact or law. Here, the Board does not find that the issues raised by Pro-Tech are sufficient to warrant reconsideration or modification of its January 21 Order.

An applicant's dissatisfaction with the decision or outcome is not enough for the Board to modify an order. D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990) and Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996).

> Reconsideration should be utilized only for those cases which fall into that narrow corridor in which either 1) the Court has expressed its decision based upon a palpably incorrect or irrational basis, or 2) it is obvious that the Court either did not consider, or failed to appreciate the significance of probative, competent evidence. Said another way, a litigant must initially demonstrate that the Court acted in an arbitrary, capricious, or unreasonable manner, before the Court should engage in the actual reconsideration process.
> [D'Atria, supra, 242 N.J. Super. at 401.]

Because Pro-Tech has not met its burden, the Board **DENIES** Pro-Tech's Motion.

Pro-Tech's Motion reiterates the request in its Application to have all 5 proposed solar arrays certified as being located on land which constitutes a properly closed sanitary landfill facility.[11] The Motion did not provide compelling new information that was not previously considered by the Board. When a request for reconsideration appears merely to reiterate the facts and arguments contained in submissions already considered by the Board, the Board may deny the petition. I/M/O the Board's Review of Unbundled Network Elements Rates, Terms and Conditions of Bell Atlantic-New Jersey, Inc., 2004 N.J. PUC LEXIS 158, at *23-24 (N.J. Adm. September 22, 2004).

The definition of "properly closed sanitary landfill facility" is found at N.J.S.A. 48:3-51. As previously noted, N.J.S.A. 48:3-51 reads:

> [A] sanitary landfill facility, or a portion of a sanitary landfill facility, for which performance is complete with respect to all activities associated with the design, installation, purchase, or construction of all measure, structures, or equipment required by the Department of Environmental Protection, pursuant to law, in order to prevent, minimize, or monitor pollution or health hazards resulting from a sanitary landfill facility subsequent to the termination of operations at any portion thereof, including, but not necessarily limited to, the placement of earthen or vegetative cover, and the installation of methane gas vents or monitors and leachate monitoring wells or collection systems at the site of any sanitary landfill facility.

Considering this definition, DEP reviewed the Application and other documents to determine the land use classification and the closure or remediation status of the proposed site. Specifically, DEP considered that the property had been listed – and later removed – from the National Priorities List. (DEP December 2014 Memo at 2.) DEP also considered that Attachment 1 and the USEPA Record of Decision described the FLR landfill as a 60-acre site that contained a 29-

[11] As previously noted, Pro-Tech alternatively argues that the site meets the requirements of a brownfield. However, as noted in footnote 9, as of the date of its Motion – and, more importantly, the date of the Board's Order – the Board only had a pending Subsection t landfill application.

acre landfill, two lagoons, a pond and two tanks.[12] Id. Notably, DEP considered that it is the "29-acre landfill" that is capped and surrounded with a slurry wall and which Figure 2 of Attachment 2 to the Application depicts with a bold dashed line as "landfill area." Id. Accordingly, DEP found that the 29-acre area within the dashed "landfill area" boundary is the area that meets the definition of a properly closed sanitary landfill facility, and that only Arrays B, C and D are inside the boundaries of the properly closed sanitary landfill facility. Id.

The Board **FINDS** that DEP's determination specifying the portion of the site which meets the definition of a properly closed sanitary landfill facility – and the Board's reliance on that determination – is properly supported by the Application and by the plain text of the Solar Act. A decision of the Board is valid if there is reasonable support in the record. In re Public Service Electric and Gas Company, 167 N.J. 377, 393 (2001).

Next, the Board considers Pro-Tech's attempts to redefine or enlarge the statutory definition by placing emphasis on selective terms contained in the definition of a properly closed sanitary landfill facility. Based on its choice of words in the Motion, Pro-Tech appears to conflate the words "landfill," "closed landfill," and "facility" with the term "properly closed sanitary landfill facility." The latter, however, is a defined term in the Solar Act and is the one that governs.

Pro-Tech also claims that the entire 68-acre site is a properly closed sanitary landfill facility, because the site contains groundwater monitoring wells on areas beyond the 29-acre portion. Pro-Tech avers that this measure was implemented to monitor the impacts of the facility. July 27 Letter at 2. However, DEP states that groundwater monitoring wells are often installed off site following implementation of a remedial action plan and that such wells may even be located upon adjacent residential properties. DEP September 2015 Memo at 2. Thus, the mere presence of these wells does not signal the existence of a landfill at that location, much less constitute a properly closed sanitary landfill facility as defined in the Solar Act. Moreover, DEP advises that only "Arrays B, C and D are located on areas at which DEP required measures, structures, or equipment (namely, a cap and slurry wall) in order to prevent, minimize, or monitor pollution or health hazards resulting from a sanitary landfill facility subsequent to the termination of operations." Id.

Pro-Tech also contends that "substantial effort" has been expended on this project, in that PJM Interconnection and local planning board approvals have been obtained, and that the project will not be financially viable as currently certified. Motion at 2. However, the extent of effort expended upon a project, the approvals granted by other agencies, or the claimed need for a subsidy in the form of SRECs are not identified as factors to be considered in making a decision under Subsection (t). The Board's limited determination here is whether the solar facility is located on property defined within Subsection t and therefore eligible to be designated as "connected to the distribution system." Therefore, the Board does not find this argument persuasive or a basis to warrant reconsideration.

The Board also addresses Pro-Tech's criticism that it lacked the opportunity to correct "the misinformation provided in . . . [DEP's December 2014] memo." Motion at 2. But, Pro-Tech, in essence, takes issue with the conclusions and interpretations reached by DEP, and not with the

[12] See, Landfill Application, Attachment 1 at 2; USEEPA Record of Decision at 2, http://cumulis.epa.gov/superrods/index.cfm?fuseaction=data.siterods&siteid=0200625

underlying facts. Accordingly, nothing in Pro-Tech's Motion challenges the facts relied on or changes the ultimate conclusions reached.

Based on its review of the record, the Board **FINDS** that Pro-Tech has not demonstrated that the Board acted in an arbitrary, capricious, or unreasonable manner. The Board **FINDS** that nothing in the Motion causes or requires the Board to reconsider its January 21, 2015 decision, limiting certification to the 29-acre area on which Arrays B, C and D are proposed to be constructed. Therefore, the Board **HEREBY DENIES** Pro-Tech's request that the entire 68-acre site be certified as a properly closed sanitary landfill facility.

This Order shall be effective on November 26, 2015.

DATED: 11/16/15

BOARD OF PUBLIC UTILITIES
BY:

RICHARD S. MROZ
PRESIDENT

JOSEPH L. FIORDALISO
COMMISSIONER

MARY-ANNA HOLDEN
COMMISSIONER

DIANNE SOLOMON
COMMISSIONER

ATTEST:

IRENE KIM ASBURY
SECRETARY

In the Matter of the Implementation of L. 2012, C. 24, The Solar Act of 2012;
In the Matter of the Implementation of L. 2012, C. 24, N.J.S.A. 48:3-87(t) – A Proceeding to Establish a Program to Provide SRECs to Certified Brownfields, Historic Fill and Landfill Facilities; Pro-Tech Energy Solutions, LLC Florence Land Recontouring Landfill – Motion for Reconsideration
Docket Nos. EO12090832V, EO12090862V, and QO14070714

SERVICE LIST

Irene Kim Asbury, Secretary
Office of the Secretary
NJ Board of Public Utilities
44 South Clinton Avenue, 9th Floor
Post Office Box 350
Trenton, NJ 08625-0350
Irene.asbury@bpu.state.nj.us

Stefanie A. Brand, Esq., Director
Division of Rate Counsel
140 Front Street, 4th Floor
Post Office Box 003
Trenton, NJ 08625-0003
sbrand@rpa.state.nj.us

Felicia Thomas-Friel, Esq.
Division of Rate Counsel
140 Front Street, 4th Floor
Post Office Box 003
Trenton, NJ 08625-0003
fthomas@rpa.state.nj.us

Sarah Steindel, Esq.
Division of Rate Counsel
140 Front Street, 4th Floor
Post Office Box 003
Trenton, NJ 08625-0003
ssteindel@rpa.state.nj.us

Caroline Vachier, DAG
Division of Law
Dept. of Law & Public Safety
124 Halsey Street
Post Office Box 45029
Newark, NJ 07102-45029
Caroline.Vachier@dol.lps.state.nj.us

Dennis M. Toft, Esq.
Chiesa, Shahinian & Giantomasi, PC
One Boland Drive
West Orange, NJ 07052
dtoft@csglaw.com

Betsy Ackerman, Director
Office of Clean Energy
NJ Board of Public Utilities
44 South Clinton Avenue, 9th Floor
Post Office Box 350
Trenton, NJ 08625-0350
elizabeth.ackerman@bpu.state.nj.us

Benjamin S. Hunter
Office of Clean Energy
NJ Board of Public Utilities
44 South Clinton Avenue, 9th Floor
Post Office Box 350
Trenton, NJ 08625-0350
b.hunter@bpu.state.nj.us

Allison E. Mitchell, AAI
Office of Clean Energy
NJ Board of Public Utilities
44 South Clinton Avenue, 9th Floor
Post Office Box 350
Trenton, NJ 08625-0350
allison.mitchell@bpu.state.nj.us

Rachel Boylan, Legal Specialist
Counsel's Office
NJ Board of Public Utilities
44 South Clinton Avenue, 9th Floor
Post Office Box 350
Trenton, NJ 08625-0350
rachel.boylan @bpu.state.nj.us